Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

STAN HABR,
Petitioner,

VS.

WORLD SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION TWO

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37 pp

QUESTIONS PRESENTED

1. Must procedural due process under the Fourteenth Amendment be accorded to private arbitrations ordered under state law?

2. Does California Code of Civil Procedure Section 1286.2 violate the Due Process Clause of the Fourteenth Amendment by limiting procedural review of arbitrations to extrinsic fraud?

3. Is it a violation of the Due Process Clause to imply a claim for attorneys fees in favor of a prevailing party in an arbitration?

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Petitioner and plaintiff Stan Habr respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeal, First Appellate District (per J. Anthony Kline, P.J.) filed on May 29, 2000, on which review was denied by the California Supreme Court on August 16, 2000.

OPINIONS AND ORDERS BELOW

The opinion to which this Petition is addressed is an unreported opinion of Division Two of the First Appellate District of the California Court of Appeal affirming the judgment of the trial court confirming an arbitration award in favor of respondent World

Savings And Loan Association. The opinion is reproduced in Appendix A. The order of the Supreme Court of the State of California denying review is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeal was entered on May 29, 2000. A timely petition for review was denied by the California Supreme Court on August 16, 2000. This petition for certiorari is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

1. The Due Process Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

[N]or shall any State deprive any person of . . . property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

This Petition questions whether due process should be accorded in a state ordered private arbitration in which the panel awarded attorneys fees of over $320,000, in favor of the respondent, World Savings and Loan Association ("World"), and against petitioner and plaintiff, Stan Habr ("Habr"), after World's counsel refused to produce relevant documents and files, where the attorneys fees were not pleaded in the arbitration, where cross examination was curtailed, where the arbitrators improperly shifted the costs of the arbitration to the appellant and various other improprieties.

B. Background

In 1992, Petitioner Stan Habr purchased a 130 unit apartment complex from respondent World in Sacramento, California which resulted in a dispute over misrepresentations made by World. Mr. Habr believed that World had substantially misstated the number of tenants and their rents.

B. Procedural History

In 1993, World commenced litigation against Mr. Habr by the filing of a foreclosure action in the Sacramento Superior Court. Mr. Habr cross complained for breach of contract and misrepresentations, but only in regard to the misstated list of tenants. After cross complaining in the foreclosure suit, Mr. Habr filed for reorganization under Chapter 11.

In 1994, Mr. Habr stipulated to have the issues in his cross complaint *only* arbitrated before the American Arbitration Association.

In 1995, the bankruptcy court authorized, as part of a confirmed plan of reorganization for Mr. Habr, the filing of an additional action against World in the Superior Court, Alameda County, California for intentional misrepresentations related to the misstated rent revenues. The issue in the new action was not part of the previously stipulated arbitration. Nonetheless, the Alameda Court ordered the new dispute to be decided with the other arbitration claims.

In the course of preparation for the arbitration, World refused to comply with its discovery obligations and failed to produce its principal file on the transaction, 834 pages, until *after* the depositions of the pertinent World witnesses had been completed. Worlds's counsel argued that there was "little" that had not been previously produced. Mr. Habr's counsel argued that he had been

materially prejudiced by his inability to have adequate discovery before the depositions.

In 1997, after a five day hearing, the arbitration panel ruled in favor of World and, *even though attorneys fees had not been pleaded by World*, awarded it over $320,000 in fees as the prevailing party. The award was confirmed by the Alameda Superior Court. Petitioner Habr argued that the award should be vacated under California Code of Civil Procedure Section 1286.2 on the ground that the award had been procured by "undue means," that respondent's attorneys fees were not within the scope of the arbitration, that the arbitrators had refused to hear relevant evidence, that the arbitrators had improperly shifted the costs of the arbitration to him and various other violations of due process.

The California Court of Appeal, Justice J. Anthony Kline, presiding, reviewing the matter de novo, on May 29, 2000, affirmed the award on the ground that the appellant had not demonstrated extrinsic fraud[1] and the panel was authorized to award fees to World, as the prevailing party. The Court refused to consider or apply the broader concept of due process, limiting its review per Section 1286.2 to extrinsic fraud. (Appendix A-17)

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[1]Code of Civil Procedure Section 1286.4, provides:
...the court shall vacate the award if the court determines any of the following:
(a) The award was procured by corruption, fraud or other undue means...
(d) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted...
(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to ...hear evidence material to the controversy...

On July 6, 2000, petitioner Habr filed a petition for review with the Supreme Court of California. The petition was denied on August 16, 2000. (Appendix B).

REASONS FOR GRANTING THE WRIT

A. Due Process Should Be Accorded to Private Arbitrations Ordered under State Law.

With alternate dispute resolutions ("ADR") steadily replacing our civil court system, it is appropriate and timely to consider whether state mandated private arbitrations must comply with basic Constitutional constraints. Or stated another way, to what extent should the protections of the Due Process Clause of the Fourteenth Amendment be accorded to state directed private arbitrations?

The Supreme Court presently has under submission the issue of whether employees can be required to arbitrate their federally protected employment rights. *Circuit City Stores, Inc. v. Adams*, No. 99-1379. If the Court rules that employees are subject to arbitration, the broader issue of whether states must ensure due process in private arbitrations is ripe for determination.

The Court has previously recognized that elementary requirements of impartiality apply to the selection of unbiased arbitrators. *Commonwealth Corp. v. Casualty Co,*. 393 U.S. 145, 146-150 (1968),reh'g denied, 393 U.S. 1112 (1969). The right to an impartial trier of fact under the Fourteenth Amendment in criminal proceedings had long been recognized in *Tumey v. Ohio*, 273 U.S. 510, (1927). In Tumey, Justice Taft opined:

> But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due

> precess of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

In 1985, this Court confirmed Fourteenth Amendment rights to an unbiased trier of fact in a civil matter in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

No less timely are Justice Taft's remarks on the Due Process Clause in *Truax v. Corrigan*, 257 U.S. 312 (1921), when he said:

> The due process clause requires that every man shall have ... the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously....(page 332)

In *Commonwealth Corp.*, supra, Justice Black noted that:

> ...we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

We now respectfully request the Court to consider the issue of whether a private arbitration ordered by a state judicial court is entitled to procedural due process protections under the Fourteenth Amendment.

We now respectfully request the Court to consider the issue of whether a private arbitration ordered by a state judicial court is entitled to procedural due process protections under the Fourteenth Amendment.

B. California Code of Civil Procedure Section 1286.2 Violates the Fourteenth Amendment of the United States Constitution.

Our case presents the issue directly. Petitioner Habr asserted sweeping violations of due process in the course of his Court ordered arbitration before the American Arbitration Association. The Court of Appeal confined its review under the applicable statute, California Code of Civil Procedure Section 1286.2, to extrinsic fraud. (Appendix A-17) If the statute is so confined, an arbitrated decision can be binding on a litigant even though substantial violations of due process have occurred. Since an ever increasing proportion of the population is now required to resolve their claims through ADR processes, minimum requirements of procedural fairness should be ensured. We submit that Mr. Habr's case presents a timely opportunity to address this issue.

C. Due Process Requires an Identification or Pleading of Claims before They Are Decided by an Arbitration Panel.

Another issue which raised a due process question was the panel's award of over $320,000 when no fee request had been pleaded or identified by World until the day of the hearing. Basic principles of due process would require an adequate warning and identification of such a substantial claim.

Justice Kline ruled that the panel was not acting in excess of jurisdiction because the contract in dispute had a prevailing party attorneys' fee clause, and therefore Mr. Habr should have suspected that such a claim was forthcoming.

CONCLUSION

There is no denying that more and more civil disputes are being resolved through the ADR process. Perhaps the preponderance of civil matters are now decided in this manner. As this trend continues, it is important that minimal standards of due process are accorded to those whose rights are being decided. It is important that we have faith that a modicum of basic procedural fairness is guaranteed through the Constitution.

We respectfully ask that this petition be granted and that these questions be set for plenary consideration. The Court of Appeal should be instructed to review our appeal under the standards set forth by this Court.

Respectfully submitted,

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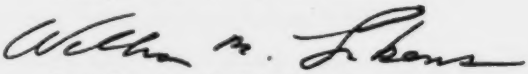

By WILLIAM M. LUKENS
Attorneys for Petitioners

Dated: November 13, 2000

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APPENDIX A

Not To Be Published in Official Reports

In the Court of Appeal of the State of California

First Appellate District

Division Two

A084868 (Alameda County
Super. Ct. No. 750274-7)

Stan Habr,
Plaintiff and Appellant,

v.

World Savings and Loan Association,
Defendant and Respondent.

[Filed May 29, 2000]

Stan Habr appeals from a judgment of the trial court confirming an arbitrator's award in favor of World Savings and Loan Association. He contends the trial court erred in confirming the award because the claim upon which it was based was not within the scope of the arbitration, the award was procured by undue means, the arbitrators refused to hear relevant evidence, the arbitrators awarded excessive attorney fees, and the award violated orders of the bankruptcy court.

STATEMENT OF THE CASE AND FACTS

On April 16, 1992, appellant purchased a 130-unit apartment complex in Sacramento, known as the Cadillac South Apartments, from respondent fro $2,995,000. In connection with the sale, respondent loaned appellant $2, 685,000; appellant's promissory note was secured by a deed of trust on the property. The Real Estate Purchase Contract, in paragraph 170, provided

for an arbitration of disputes: "Any dispute or claim in law or equity arising out of this contract or any resulting transaction shall be decided by neutral binding arbitration in accordance with the rules of the American Arbitration Association, and not by court action..."

Appellant defaulted under the terms of the promissory note and deed of trust by failing to make the monthly payment of $20,171.51 due on November 1,1992, and subsequent payments. On January 22, 1993, respondent filed a judicial foreclosure action in the Sacramento County Superior Court. A receiver was appointed on January 29, 1993.

In February 1993, appellant filed a cross-complaint for breach of contract, intentional nondisclosure of material facts, negligent misrepresentation of material facts, recission, interference with prospective business interest, violation of the covenant of good faith and fair dealing, negligent affliction of emotional distress, constructive trust, and exemplary damages. In April 1993, respondent filed a petition to compel arbitration of the claims raised in the cross complaint. This petition was denied without prejudice. Appellant then tried unsuccessfully to enjoin a trustee's sale of the property, which was held on June 4, 1993.

After respondent's demurrer to the cross-complaint was sustained in part and overruled in part on June 8, 1993, appellant filed an amended cross-complaint containing causes of action for breach of contract, intentional nondisclosure of material facts, restitution, and violation of the covenant of good faith and fair dealing. Appellant alleged that respondent had failed to disclose or misrepresented certain facts, including that the City of Sacramento had filed suit against the prior owners of the property for abatement of public nuisance and other causes of action, the property faced demolition if violations enumerated in the city's suit were not corrected within three weeks, four of the complexes required re-roofing, at least 15 of the units were "in an undisclosed state of severe disrepair and dilapidation," and 15 to 20 of the units were not disclosed on the rent roll provided by respondent's agent to be delinquent and/or occupied by tenants

who should not have been permitted to rent and were subsequently evicted for nonpayment of rent.

On July 22, 1993, the parties entered into an agreement under which respondent agreed not to prosecute its judicial foreclosure case and appellant agreed to dismiss his cross-complaint without prejudice, with the claims raised in the cross-complaint to be submitted to an arbitration in accordance with paragraph 17(0) of the contract. Thereafter, appellant dismissed his cross-complaint and, in October 1993, filed a demand for arbitration with the American Arbitration Association (AAA). A panel of three arbitrators was selected, a preliminary hearing was held on January 10, 1994, and arbitration hearing was scheduled to begin on March 30th, 1993, and the parties engaged in discovery.

A dispute arose between the parties regarding the scope of the arbitration when appellant sought to introduce a claim that respondent had negligently loaned him too much money. Respondent took the position that it had agreed to arbitrate only the claims raised in appellant's cross-complaint and that the new claim did not fall within the arbitration clause of the contract because it did not pertain to the real estate purchase but rather to the loan, the documentation of which did not contain and arbitration clause. Respondent informed appellant it would seek to enjoin the arbitrators from hearing the negligent lending issue. Ultimately, the parties agreed to postpone the arbitration hearing until at least August 1994 to allow a determination in superior court as to the arbitrability of the new issue.

On July 22, 1994, appellant filed a petition for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the Northern District of California (*In re Stanley Michael Habr,* Case No. 94-54795-JRG). Thereafter, appellant dismissed his original counsel and retained his current counsel.

In April 1995, appellant and West Valley Charter Line, Inc. (West Valley), a corporation owned and controlled by appellant, instituted the present action by filing a complaint in

Alameda County Superior Court for negligent lending, fraudulent misrepresentation and false advertising.

Both respondent and its parent company, Golden West Financial Corporation, were named as defendants. In the first cause of action, appellant alleged that respondent had advertised the Cadillac South Apartments as having a positive cash flow, with expenses at 40 percent of projected rental income, but knew or should have known it in fact had a negative cash flow which would leave appellant unable to service the loan respondent extended to appellant, and that after acquisition of the property appellant was subjected to a negative cash flow, drain on his resources, and eventually repossession of the property and loss of credit standing. In the second cause of action, appellant alleged that before the sale, respondent misrepresented that the current rent being collected was $41,000 per month, that documentation of expenses for the prior year included as monthly expenses for the prior year included as monthly expenses items that were in fact one-time annual expenses, and that the property was operating at a break-even point and would produce a slightly positive cash flow even after putting the new debt service into place, whereas in fact the rental income was $32,000 per month, the expenses exceeded those portrayed for the prior year, and the cash flow was nowhere near break-even. Appellant alleged that respondent's representations caused him "to proceed to close escrow on the transaction for the purchase of the Cadillac South Apartments." In the third cause of action appellant alleged that respondent's conduct violated Business and Professions Code section 11750.

In response to various demurrers, appellant and West Valley filed first and second amended complaints containing the above three causes of action and adding causes of action for intentional and negligent interference with economic advantage. The allegations of the second and third causes of action, for intentional misrepresentation and false advertising, remained identical to the corresponding allegations of the original

complaint.[2] Each version of the complaint was met with a petition to arbitrate the second and third causes of action, for intentional misrepresentation remained viable and only appellant remained as a plaintiff.

On December 18,1995, respondent's third petition for an order compelling arbitration was granted.

In October 1996, appellant requested additional documents in discovery, which respondent provided in November. Respondent's cover letter referred to "additional documents that have been recently located." On December 13, 1996, respondent produced two files, one of which, the "REO" file regarding the Cadillac South Apartments, appellant claimed had never been produced before. According to the declaration of appellant's counsel, the newly produced file contained 832 pages of documents, including a note from respondent's vice president

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[2] The second amended complaint contained substantial elaboration of the first cause of action, alleging that respondent advertised the property as having a "40% expense cost", that respondent, in its dual role as lender and seller, was provided with information on the financial status of both appellant and West Valley and had access to income and expense figures for the project, that respondent's dual role allowed appellant to reasonably interpret its approval of the loan as a representation that the value of the property exceeded that of the loan, that respondent knew or should have known of the property's actual negative cash flow and that the purchase would cause severe and immediate financial damage to appellant and West Valley but failed to correct its false advertisement and instead provided further information indicating a positive cash flow, that respondent's employee, in performing an "income and break even analysis" before the closing, was careless and negligent in enumerated respects, and that upon acquisition of the property appellant and West Valley were immediately subjected to huge cash drains on their financial resources which ultimately caused repossession of the property and appellant's bankruptcy.

"directing that no one reveal the actual rental income of the apartment complex to potential purchasers."
In another declaration, appellant's counsel stated that during discovery respondent's counsel had represented they could not locate the loan file related to the Cadillac South Apartments and that after appellant had deposed all of respondent's percipient witnesses, counsel informed appellant they had "located" the file and produced 854 pages of documents. Respondent claimed the production included "a very limited number of documents" that had not been produced previously.

On December 16, 1996, a telephone hearing was held before the panel of arbitrators regarding discovery matters and, among other things, respondent was ordered to produce certain documents prior to the deposition of its custodian of records. The arbitrators subsequently held that James Judd, respondent's executive vice-president, was not required to give deposition testimony. The arbitration hearing, which had been set for January 1997, was postponed at appellant's request to allow for discovery. Respondent made two of its witnesses available to be redeposed; appellant's request to have respondent bear the cost of the additional depositions was denied, and appellant did not take further depositions.

On January 6, 1997, the bankruptcy court confirmed appellant's Sixth Amended Plan of Reorganization. This plan made specific reference to the present litigation in providing for payment of creditors from the proceeds of the arbitration, requiring bankruptcy court approval or any settlement of the arbitration and referring to appellant's agreement with his counsel for representation in the arbitration.

The arbitration hearing took place over the course of six days in late March and early April 1997. The arbitrators issued an interim award finding that appellant had failed to carry the burden of proving fraud, misrepresentation or concealment and failed to prove he relied upon the information he was given by respondent. Respondent was deemed the prevailing party and was directed to file a brief on its claimed entitlement to attorney fees.

On April 30, respondent gave appellate notice that if it prevailed on its request for attorney fees, it would file a motion for an award of an administrative expense priority claim in the bankruptcy case.

In September 1997, the arbitrators issued their award denying appellant's claim, naming respondent the prevailing party, directing appellant to pay to respondent attorney fees and costs in the amount of $309,784.63, including $18,096 in expert witness fees, as well as $8,137.91 for administrative fees and expenses of the AAA, $600 for postponement fees and $37,457.34 for the arbitrators' compensation and expenses. Respondent filed a petition in Alameda County Superior Court to confirm the arbitration award. On October 20, 1997, appellant filed a notice of removal to the federal bankruptcy court, respondent filed a motion for remand and/or abstention. On December 16, 1997, on appellant's motion, the proceeding was transferred to the bankruptcy court's division in San Jose and the judge presiding over appellant's bankruptcy case. By order filed on June 4, 1998, the bankruptcy court exercised its discretion to abstain from hearing the confirmation petition.

Respondent renewed its petition to confirm the arbitration award in superior court. The petition was granted by order filed on August 25, 1998. Judgement was entered on September 23, 1998. Respondent served notice of entry of judgement on October 2, 1998.

Appellant filed a timely notice of appeal on October 29, 1998.

DISCUSSION

"It is well settled that the scope of judicial review of arbitration awards is extremely narrow. (*Moncharch v. Heily & Blase* (1992) 3 Cal. 4th 1...(*Moncharch*); *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9th Cal.4th 362...(*AMD).)* Courts may not review either the merits of the controversy or the sufficiency of the evidence supporting the award. *(Southern Cal. Rapid Transit District. v. United Transportation Union* (1992) 5 Cal.App.4th 416, 422-423...)

Furthermore, with limited exceptions, '...an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.' (*Moncharch ,supra,*3 Cal.4th at p. 6; see also pp. 25-28.)

These rules 'vindicate [] the intentions of the parties that the award be 'final'(*id.* at p.11) and support the "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution ."' (*Id.* at p. 9, quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312,322...)" (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App. 4th 935, 943-944; *Moshonov v. Walsh* (2000) 22 Cal. 4th 771.)

In contrast with the standards governing review of the arbitration award itself, this court reviews the trial court's decision to confirm an arbitration award de novo. *(Lisenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 935, 943-944, *Moshonov v. Walsh* (2000) 22 Cal. 4th 771.)

In contrast with the stands governing review of the arbitration award itself, this court reviews the trial court's decision to confirm an arbitration award de novo. *(Lisenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892,fn. 7; *Advanced Micro Devices, Inc. v Intel Corp., supra,* 9 Cal.4th 362, 376, fn. 9; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

Where the trial court's decision is based upon a determination of disputed factual issues, we review those issues according to the substantial evidence test. (*Lisenstadt, supra,* 55 Cal.App.4th at p. 1527, fn. 2.) Under that test, "the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence,*

or drawing other reasonable inferences, might have reached a contrary conclusion. [Citations.]'" *(Barber v. Rancho Mortgage & Investment Corp.* (1994) 26 Cal.App.4th 1819, 1833, quoting *Bowers v. Bernards.*
(1984) 150 Cal.App.3d 870, 873-874, original italics.)

Code of Civil Procedure section 1286.2[3] lists the exclusive grounds upon which an arbitration award may be vacated. (See, *California Faculty Assn. v. Superior Court, supra,* 63 Cal.App.4th at p. 944.) Appellant relies upon three of these: "The award was procured by corruption, fraud or other undue means" (§ 1286.2, subd. (a)); "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted" (§ 1286.2, subd. (d)); and "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to...hear evidence material to the controversy...."(§1286.2, subd. (e).)[4]

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[3] All further statutory references will be to the Code of Civil Procedure except as otherwise specified.

[4] The full grounds for vacating an arbitration award are listed in section 1286.2 as follows:

"(a) The award was procured by corruption, fraud or other undue means.

"(b) There was corruption in any of the arbitrators.

"(c) The rights of the party were substantially prejudiced by misconduct of a neutral
arbitrator.

"(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

"(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the

I.

We consider first appellant's claim that the trial court erred in confirming the arbitration award because the intentional misrepresentation claim, the second cause of action in the second amended complaint, was not within the scope of the parties' arbitration agreement. Appellant urges the arbitrators exceeded their authority in determining this claim.

"In determining whether the arbitrators exceeded their powers, courts must give 'substantial deference to the arbitrators' own assessments of their contractual authority....' (*AMD,supra*,9 Cal.4th at p. 373.) A deferential standard is in keeping with the general rule of arbitral finality and ensures that judicial intervention in the process is minimized. (*Ibid.)* 'A rule of judicial review under which courts would independently redetermine the scope of an arbitration agreement already interpreted by the arbitrator would invite frequent and protracted judicial proceedings, contravening the parties' expectations of finality.; (*Ibid.)*....[¶] The Supreme Court recognized in both *Moncharsh* and *AMD*, however, that the parties must be free to fashion agreements which restrict or limit the arbitrator's authority. "'[T]he scope of arbitration is...a matter of agreement between the parties'" (*Moncharsh,supra*, 3 Cal.4th at p.8):'[t]he powers of an arbitrator derive from, and are limited by, the agreement to arbitrate.'(*AMD,supra,*9 Cal.4th at pp. 375-376.) Otherwise, arbitrators would possess the "unusual power" of being able to determine their own jurisdiction and Code of Civil Procedure

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arbitrators contrary to the provisions of this title.

"(f) An arbitrator making the award was subject to disqualification upon grounds specified in section 1281.9, but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceeding conducted under a collective bargaining agreement between employers and employees or between their respective representatives."

section 1286.2, subdivision (d), would be a nullity. (*AMD, supra,* 9 Cal.4th at p 375, quoting *McCarroll v. L.A. County etc. Carpenters* (1957) 49 Cal. 2d 45, 65-66...'[C]ourts retain the ultimate authority to overturn awards as beyond the arbitrator's powers...' (*AMD,supra,*9 Cal.4th at p. 375.)" (*California Faculty Assn. v. Superior Court, supra,*63 Cal. App.4th at p.944.)

"The right to arbitration depends on a contract. [Citations.] Accordingly, a party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so." (*Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271.) "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate...." [Citations.]" (*Victoria v. Superior Court* (1985) 40 Cal. 3d 734, 744.)

"In determining the scope of an arbitration clause, '[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].' [Citation.]"
(*Victoria v. Superior Court* (1985) 40 Cal.3d at p 744.)
""Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute [Citation.]"' (*Ibid.*)" (*United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021,1026; see, *East San Bernardino County Water Dist. v. City of San Bernardino* (1973) 33 Cal.App.3d 942, 953.)

In the present case, the parties' real estate purchase agreement contained an arbitration clause providing: "Any dispute or claim in law or equity arising out of this contract or any resulting transaction shall be decided by neutral binding arbitration in accordance with the rules of the American Arbitration Association, and not by court action..." Additionally,

in the context of the Sacramento litigation, the parties specifically agreed to submit to arbitration the claims raised by appellant's cross-complaint. Appellant maintains that the latter agreement did not include claims raised in the subsequent Alameda County action. With respect to the contractual provision, appellant urges that respondent is estopped from arguing the intentional misrepresentation claim is arbitrable because respondent refused to allow appellant to introduce new claims into the arbitration of the Sacramento case.

"Whether a party to an arbitration agreement has waived the right to arbitrate is a question of fact, and a trial court's determination on that matter will not be disturbed on appeal if supported by substantial evidence." (*Sobremonte . v. Superior Court* (1998) 61 Cal. App. 4th 980, 991.) Here, the claim in the Sacramento cross-complaint alleged misrepresentations by respondent regarding the physical and financial condition of the apartment complex in connection with the sale of the property to appellant. After these claims were submitted to an arbitration, appellant sought to introduce into the arbitration a new claim that respondent had been negligent in extending its loan to appellant. Respondent took the position that this claim arose from respondent's loan to appellant, the documentation of which did not contain any arbitration agreement, and not from the real estate purchase itself. Although respondent consistently maintained that the negligent lending claim was not within the scope of the parties' arbitration agreement, which was limited to the claims raised in the Sacramento action, it never suggested that the other claims raised in the Alameda complaint were not subject to arbitration. Rather, respondent sought to compel arbitration of the misrepresentation and false advertising causes of action, although not of the negligent lending claim (or of appellant's causes of action for interference with economic advantage)[5] In

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[5] Appellant's cross-complaint in the Sacramento action contained a cause of action for interference with prospective

short, respondent never attempted to resist arbitration of the claim that it misrepresented facts in the course of the transaction by which it sold the property to appellant. The record thus supports the trial court's implied determination that respondent did not waive its right to arbitration. (See, *Owens v. Intertec Design, Inc.* (1995) 38 Cal.App.4th 72,74 [arbitration agreement must be enforced where no substantial evidence supports trial court's implied finding that grounds existed for revocation of agreement].)

The present case is quite different from those upon which appellant relies. In *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, 221-222, a waiver was found because the party attempting to obtain arbitration had repudiated the validity of the contract upon which the claim to arbitration was based; having repudiated the validity of the contract upon which the claim to arbitration was based; having repudiated the entire contract, the party was held to have necessarily repudiated the arbitration clause contained in the contract. *Grunwald-Marx, Inc. v. Los Angeles Joint Bd. Amalgamated Clothing Workers of America* (1961) 192 Cal.App.2d 268, 277-279, held that a party who had refused to submit an issue to arbitration could not later insist

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business interest which alleged that respondents failure to extend a deferred payment schedule to appellant, placement of a receiver on the property, and filing of suit "interrupted the process of securing the rehabilitation loan which would have permitted [appellant] to both make the undisclosed repairs and to meet his monthly obligations under the note and deed of trust" and prevented appellant from "going forward with this contemplated business interest". This cause of action did not appear in appellant's amended cross-complaint. The causes of action for interference with economic disadvantage in the Alameda complaint alleged that respondent interfered with the prospective economic advantage of West Valley by interfering with appellant's financial viability and making it impossible for him to guarantee West Valley's financial operations.

upon arbitration of that issue. Here, as has been explained, although respondent sought to prevent arbitration of the negligent lending claim on the theory that it did not arise from the real estate purchase agreement or settlement agreement, it never resisted arbitration of the claims ultimately submitted to arbitration.

Moving beyond the question of waiver, as indicated above, the arbitration clause in the real estate purchase agreement provided for arbitration of "[a]ny dispute or claim in law or equity arising out of this contract or any resulting transaction...".) "[W]here contracts provide arbitration for "any controversy...arising out of or relating to the contract..." the courts have held such arbitration agreements sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims 'have their roots in the relationship between the parties which was created by the contract.' [Citations.]" (*Bos. Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 105.) The intentional misrepresentation claim clearly comes within the arbitration clause of the parties' contract. Indeed, appellant makes no argument to the contrary. Having determined that respondent did not waive its right to arbitration and that the parties' contract required arbitration of appellant's cause of action for intentional misrepresentation, we need not address the question whether intentional misrepresentation claim was also subject to arbitration under the settlement agreement.

II.

Appellant next contends that the arbitration award was procured by undue means. Under section 1286.2, subdivision (a), an arbitration award must be vacated if it was "procured by corruption, fraud or other undue means." Appellant argues that he was deprived of a fair hearing because respondent failed to produce the loan file relevant to the sale of the property until after the appellant had deposed respondent's witnesses, then produced the file which included notes from respondent's vice president directing that no one give the "rents" from the property to potential buyers. Appellant maintains that he could not depose

the vice president because of the late production of these documents and could not afford to re-depose other witnesses.

The only evidence in the record pertaining to this claim consists of the conflicting declarations of the parties' attorneys. According to the declaration of appellant's attorney, respondent's counsel represented during discovery that they were unable to locate respondent's loan file related to the Cadillac South Apartments and only informed him the file had been located after appellant's depositions of the percipient witnesses had been completed. Also according to the declaration, appellant then requested the arbitrators to order respondent to bear the cost of further depositions regarding the newly produced documents, the panel refused this request, and appellant was unable to take further depositions because he lacked the financial resources to do so. The declaration states that the documents belatedly produced included a note from respondent's vice president directing that no one reveal the actual income of the apartment complex to potential purchasers.

The declaration of respondent's attorney states that respondent did not withhold documents during discovery and did not produce 834 pages of "new documents". Rather, according to this attorney, respondent produced documents to appellant's original attorney in the course of the Sacramento action, then produced additional documents in response to the request of appellant's new attorney in the context of the arbitration. After the December 16, 1996, hearing before the arbitration panel on the parties' dispute over document production, respondent provided copies of all its files to appellant; this document production included "a very limited number of documents...that had not been previously produced in 1993." Respondent agreed to make two witnesses available for further deposition, but appellant did not proceed with such depositions.

This issue was presented to the trial court in appellant's request for vacation/correction of the arbitration award. The court's order confirming the arbitration award does not relate the court's reasoning on the issues raised, and no transcript of the

confirmation hearing is included in the record on appeal. In order to confirm the award, however, the trial court necessarily had to reject appellant's argument that the award was procured by undue means, either because it resolved the factual conflict in respondent's favor or because it concluded that the discovery dispute described by the parties was not a proper ground for vacating the arbitration award.[6]

Applying a substantial evidence test to the former ground, we would have to conclude that substantial evidence-respondent's attorney's declaration- supported the trial court's implied findings. (See, *Lisenstadt v. Staff Builders, Inc.,supra,* 55 Cal.App.4th at p. 1527, fn. 2.) So as far as the record discloses, however, the only evidence presented in support or in opposition to the request to vacate consisted of the conflicting declarations of the parties' attorneys. Where the conflicting evidence is all written, we are not bound by the trial court's findings but rather exercise independent judgement. *(Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663.)

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[6] Respondent relies upon *Hirsch v. Ensign* (1981) 122 Cal.App.3d 521,529, disapproved on other grounds in *Moncharsh,supra,*3 Cal.4th 1, 27-28, for the proposition that a declaration of counsel containing general statements may not be relied upon in reviewing the confirmation of an award in the absence of stipulated facts or some concurrence as to the record before the arbitrator. In *Hirsch,* the petition to vacate the arbitration award was supported by an attorney's declaration that contained only "general statements" while the specific facts upon which the motion was based were set forth in a memorandum of points and authorities. *Hirsch* held that a motion to vacate an arbitrator's award must be accompanied by an affidavit or sworn declaration. Appellant's motion in the present case was accompanied by a declaration and the declaration did set forth the facts upon which the motion was based. Accordingly, the motion in the present case was not deficient in the matter of the one in *Hirsch.*

An arbitration award may be vacated under section 1283.2, subdivision (a), only upon a showing of extrinsic fraud, that is, fraud that deprives a party of fair and impartial hearing to his of her substantial prejudice. (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147.) Here, respondent denies having withheld any documents from appellant during discovery or belatedly produced hundreds of pages of documents that had not previously been provided to appellant, and offered to make its witnesses available for further deposition. Appellant's complaint that he was not made aware of certain documents until after depositions had been completed, he could not afford the cost of further depositions and the arbitrators refused his request to have respondent bear the cost of further depositions is, in essence, an attack on the arbitrator's resolution of the parties' discovery dispute regarding the documents in question. Once a case is submitted to arbitration, of course, the arbitrators are responsible for deciding discovery questions. (*Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 488.) "[A] challenge to an arbitrator's evidentiary rulings or limitations on discovery should not provide a basis for vacating an award unless the error substantially prejudiced a party's ability to present *material* evidence in support of its case. (§ 1283.2, subd. (e).)" (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1110, original italics.) Appellant has made no such showing.

Indeed, the state of the record makes it virtually impossible to evaluate appellant's claim..

As indicated above, the only evidence in the record regarding this claim consists of the parties' attorney's conflicting declarations. Appellant took the deposition of respondent's corporate counsel, Joseph Wynne, on the subject of the "newly-produced file", but the record on appeal does not contain the excerpts from this deposition referred to in appellant's counsel's declaration, making it impossible for this court to consider what information may have been transmitted in this deposition. Issues concerning document production were put before the arbitrators, but the record does not

contain the transcripts or correspondence that would allow this court to meaningfully review the arbitrator's decisions. The arbitrators on December 17, 1996, ordered respondent to produce certain documents identified by reference to a December 10, 1996, letter from appellant's attorney, to the extent in existence and not privileged, but that letter is not included in the record on appeal. Appellant asserts in his brief that the "suppressed file" revealed for the first time the involvement of respondent's executive vice president, James Judd, in the alleged fraud, by indicating the sale was reviewed and approved by Judd and that "reports of [respondent's] strategy in selling the apartment complex" were made Judd personally, but no evidence is cited in support of this assertion.

Accordingly, we are unable to evaluate the arbitrators' decision not to require Judd to submit to deposition. Similarly, appellant asserts in his brief that he first learned at the arbitration hearing that respondent's vice president Carney was specifically assigned to oversee the sale of the property and was responsible for the note directing withholding of rent information, but, again, no evidence is cited in support of this assertion. In the absence of stipulated facts or other concurrence as to the record before the arbitrators, a motion to vacate an arbitrator's award cannot rely upon facts presented not in a sworn affidavit or declaration but solely in a memorandum of points and authorities. *(Hirsch v. Ensign, supra,* 122 Cal.App.3d 521, 529.)

So, on appeal, one party's recitation of facts in a brief may not be the basis for reversing a trial court's judgement. As the party attacking the arbitration award, it is appellant's burden to "affirmatively establish the existence of error by a proper record." (*Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1685.)

Given the state of the record, appellant has failed to demonstrate that respondent's conduct amounted to extrinsic fraud that prevented appellant from presenting his case to the arbitrators.

III.

Appellant next maintains that the trial court erred in confirming the arbitrators' award because the arbitrators refused to hear evidence material to appellant's claim. Under section 1286.2, subdivision (e), an arbitration award must be vacated if "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to...hear evidence material to the controversy..." Appellant complains that the arbitrators refused to order Judd to submit to deposition and refused to permit appellant's attorney to cross-examine the manager of the Cadillac South Apartments, Thomas Harris, who was the author of the rent roll. Appellant sought to establish that the roll was false and that respondent instructed Harris to give it to appellant. According to the declaration of appellant's counsel, at the arbitration hearing the arbitrators ruled that he could not ask Harris "any questions about how the rent roll provided to [appellant] compared to an actual rent roll which had been prepared for internal use by [respondent's] property managers". The declaration states that approximately 30 tenants listed on the rent roll provided to appellant were not listed on the internal rent roll.

The declaration of respondent's attorney again presents a radically different factual scenario. According to that declaration, appellant's attorney did cross-examine Harris about the allegedly fraudulent rent roll, and spent longer on his cross-examination than respondent's attorney spent on the witness' direct examination. This declaration states that on a number of occasions during cross-examination, when Harris stated he could not recall, appellant's attorney continued to ask the same question and the arbitrator "suggested that [counsel] move on to a new topic."

In the absence of a transcript of the arbitration proceedings, these contrary declarations stand as the only evidence of the facts underlying appellant's claim. The superior court, in confirming the arbitration award, impliedly resolved the factual dispute in respondent's favor. Reviewing the matter independently, we are not persuaded that the arbitrators

improperly cut off appellant's questioning. In any event, in order to find the "substantial prejudice" required for vacation of an award under section 1286.2, subdivision (e), " the court must accept, for purposes of analysis, the arbitrator's legal theory and conclude that the arbitrator might well have made a different award had the evidence been allowed." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427,439.) The arbitrators in the present case found not only that appellant failed to prove fraud, misrepresentation and concealment, but also that appellant "failed to prove that he relied on even the information that was furnished him." The arbitrators concluded that "in analyzing the Property's potential," appellant "relied almost exclusively on his own sources of information and experience." Justifiable reliance is an element of intentional misrepresentation. (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474.) In light of the arbitrators' determination on reliance, appellant cannot show that the arbitrators "might well have made a different award had the evidence been allowed." (*Hall v. Superior Court, supra,* 19 Cal.App.4th 439.)

IV.

As indicated above, the arbitrators awarded respondents a total of $309,784.63 in attorney fees and costs. Although respondent's actual fee request is not included in the record on appeal, the parties' arbitration briefs on this issue make clear that the request was for fees incurred in defense of the entire span of the parties litigation, including the Sacramento action, the Alameda action, and the arbitration itself. The arbitrators specifically found that respondent's entitlement was "not restricted to fees and costs directly relating to the arbitration" because the operative provision of the real estate purchase agreement broadly authorized recovery of fees and costs to the prevailing party in "any action, proceeding or arbitration growing out of this agreement."

Appellant maintains the trial court erred in confirming this award of attorneys fees and costs for several reasons. He argues the attorney fees award was excessive, improperly

included fees incurred outside the arbitration proceedings, and violated the federal bankruptcy court's order confirming the appellant's plan of reorganization. He also urges the arbitrators impermissibly awarded expenses for respondent's expert witnesses and shifted the costs of arbitration to appellant.

Appellant's argument that the fee award is excessive and improperly included fees not incurred directly for the arbitration is based on the assumption that the arbitrators were empowered to award fees only for matters that occurred strictly within the confines of the arbitration and not for any portion of the litigation that preceded the arbitration of for trial court proceedings related to the arbitration. He relies upon *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1817-1818 (*DiMarco)*, which he describes as holding that the amount of attorney fees awarded in an arbitration rests solely within the purview of the arbitrator while the amount of fees awarded in related judicial proceedings must be made by the trial court.

In *DiMarco,* the parties' dispute was submitted to arbitration pursuant to an arbitration clause in their contract. Although that contract contained an attorney fees provision identical to that in the present case, the arbitration award denied all requests for fees. The trial court corrected the award and entered a judgement fixing the amount of attorney fees owed to the prevailing party in the arbitration. *DiMarco* upheld the trial court's decision to correct the award, finding that the arbitrator's decision to deny fees despite having found one party the prevailing party exceeded his authority under the contract, which stated that the prevailing party "*shall* be entitled reasonable attorney's fees and costs." (31 Cal.App.4th at p. 1814-1815, original italics.)

The trial court was found to have erred, however, in fixing the amount of fees rather than remanding to the arbitrator. (*Id.* at p. 1816.) With the exception of billings for preparation of the motion to correct the award and review of the opposition to that motion, the fees claimed were for services "at the arbitration level, not in the superior court." *(Ibid.) DiMarco* held the award

of fees incurred in the arbitration proceeding was properly within the arbitrator's purview and that the arbitrator was in the best position to determine the amount of such fees. (*Id.* at pp. 1916-1817.)

DiMarco further addressed the respective spheres of the arbitrator and trial court with respect to fees and costs in rejecting the suggestion that a request for fees in an arbitration must comply with the procedural requisites of section 1033.5, governing allowance of costs in the trial court. As explained in *DiMarco,* section 1293.2, within the title of the Code of Civil Procedure dealing with arbitration, specifies that costs "upon any judicial proceeding under this title" shall be awarded as provided in section 1021 et seq., including section 1033.5. Section 1284.2, by contrast, states that unless the arbitration agreement provides, or the parties otherwise agree, "each party to the arbitration shall pay his pro rata share of the expenses of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit." Thus, "'[i]n arbitration matters, the Legislature has carefully distinguished between costs incurred in the arbitration and costs incurred in superior court to enforce an arbitration award." (*DiMarco, supra,*31 Cal.App.4th at p.1817, quoting *Dickinson v. Kaiser Foundation Hospitals,*(1980) 112 Cal.App.3d 952,954.) Accordingly, *DiMarco* held that a party seeking fees and costs in an arbitration does not have to comply with section 1033.5, while a party seeking to recover in the trial court fees and costs incurred in proceedings to correct, vacate or confirm an arbitration award would have to comply with that statute. (*DiMarco, supra*, 31 Cal.App.4th at p. 1817.)

This latter portion of the *DiMarco* decision discussed procedures applicable to fee requests in arbitration proceedings and trial courts, not arbitrators' or trial courts' power to award fees. Similarly, *Dickinson v. Kaiser Foundation Hospitals, supra,* 112 Cal. App. 3d at p.954, which *DiMarco* quoted on this point, rejected the argument that the prevailing party in an

arbitration proceeding was entitled to costs under section 1032. *Dickinson* held that section 1032 applies to trial courts, noting that the Legislature's different treatment of costs incurred in enforcing an arbitration award in court— with costs to the prevailing party (§§ 1293.2, 1032)-- and costs incurred in the arbitration itself— which are to be shared pro rata absent an agreement to the contrary (§1284.2). (*Dickinson, supra,* 112 Cal. App. 3d at p.954.) *Austin v. Allstate Insurance. Co.* (1993) 16 Cal.App. 4th 1812, 1815-1816, also noted the distinction between section 1293.2, providing for costs to the prevailing party in judicial proceedings to enforce arbitration awards and section 1284.2, setting forth the legislative policy that arbitration costs be borne by the party incurring them absent a contrary agreement. (See also, *Tipton v. Systrom Donner Corp.* (1979) 99 Cal.App. 3d 501, 507-508.) None of these cases deal with arbitrators' power to award fees for trial court proceedings related to an arbitration proceeding.

In discussing the respective spheres of the arbitrator and trial court, *DiMarco* directly addressed only the relatively straightforward situation of a case submitted to arbitration, followed by proceedings to correct, vacate or confirm the resulting award. The present case followed a more complex path, with arbitration entered after a certain amount of litigation in the trial court, additional matters added to the arbitration, again after litigation in the trail court, and multiple proceedings in the trial court to compel arbitration at various stages. Extending *DiMarco's* reasoning to the present case would mean that in determining a reasonable amount of fees and costs for the arbitration, the arbitrators would have had to separate out fees and costs associated with any proceedings in the trial court (including proceedings in the Sacramento action prior to submission to arbitration, and the motions to compel arbitration in the latter action.) The subject matter of these various proceedings overlapped with that of the arbitration; some of these same issues-such as the arbitrability of the negligent lending claims-were disputed in both arbitral and judicial forums, complicating any

assessment of which costs were incurred in which forum. At least some discovery predated the actual arbitration, but may have been utilized in the arbitration. In this situation, a rule strictly limiting the arbitrators to assessment of fees and costs associated with the arbitration would be, at best, difficult to administer.

DiMarco held that a trial court may not determine the amount of fees and costs incurred in arbitration proceedings because "the issue of the *amount* of attorney fees and costs to be awarded for the arbitration proceeding was properly a matter for the arbitrator." (*Id.* At p. 1816, original italics.) It does not necessarily follow that an arbitrator has no authority to award fees and costs incurred at the arbitration level-that is, prior to issuance of the arbitration award-but in a judicial forum. Here, the parties' contract called for an arbitration of any dispute "arising out of this contract" and for attorney's fees and costs to the prevailing party "in any action, proceeding or arbitration arising out of the agreement." This broad language gave the arbitrators authority to fully resolve the controversy, including awarding attorney fees and costs incurred in pursuing the arbitration to its conclusion. Appellant has cited no case directly prohibiting such an award, and we are aware of none.[7]

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[7] Two recent opinions of our Supreme Court reaffirmed the limited nature of review of arbitrator's awards. (*Moshinov v. Walsh, supra,* 22 Cal. 4th 771; *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782.) Specifically, these decisions held that where the issue of attorney is submitted to arbitration, arbitrators' decisions to deny attorney fees, based on interpretation of the contracts at issue, may not be corrected for errors of law or fact. (*Moshinov, supra,* at p.773; *Moore, supra,* at p.784.) Both cases distinguished *DiMarco* as a case in which the decision to deny fees "conflicted with the explicit and mandatory terms of the agreement." (*Moshonov, supra,* at p.779; see, *Moore, supra,* at p. 788.) Neither case considered *DiMarco's* discussion of the respective spheres of the arbitrator and trial court in determining the amount of attorney

Appellant also contends that the arbitrators' award allowed respondent to pursue a claim for attorney fees against him that had been discharged in bankruptcy. According to appellant, the attorney fees claim arose before the filing of appellant's petition for bankruptcy, at the time the parties entered the contract containing the attorney fees provision, and was discharged upon the confirmation of his reorganization plan due to respondent's failure to file a claim for the fees in the bankruptcy proceedings. Under 11 U.S.C. § 1141, subd. (d) (1), "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan-[¶] (A) discharges the debtor from any debt that arose before the date of such confirmation...whether or not- [¶] (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title; [¶] (ii) such claim is allowed under section 502 of this title; or [¶](iii) the holder of such claim has accepted the plan..." Appellant's plan of reorganization specifies that it is binding upon "any creditor, whether or not the claim of such creditor is impaired under the Plan and whether or not such creditor has accepted the plan," that appellant is "forever discharged from any and all debts that arose prior to the Confirmation Date," except as specified in the plan or held non-dischargeable by the bankruptcy court, and that "[a]ll creditors whose debts are discharged by the Order of Confirmation and all creditors whose judgements are declared null and void by the Order of Confirmation shall be forever enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as liabilities of the Debtor."

Appellant relies upon *In re Abercrombie* (9th Cir. 1998) 139 F. 3d 755. In that case, as here, a real estate agreement provided for attorney fees in favor of the prevailing party in litigation. After winning on a contract claim in the trial court,

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fees and thus neither sheds additional light on the problem in the present case.

while his opponent's appeal was pending, the debtor filed for bankruptcy. After the bankruptcy proceedings commenced, the trial court victory was reversed on appeal and attorneys fees were ordered in favor of his adversary.

Abercrombie determined that the adversary's claim for attorneys fees should be given priority status in a pending bankruptcy proceeding, but whether the confirmation of appellant's bankruptcy reorganization plan deprived the arbitrators of power to make an award of attorney fees under the parties' contract. *Abercrombie* did not directly deal with the issue of discharge of such claims.

Respondent, by contrast, relies on *Siegel v. Federal Home Loan Mortg. Corp* (9th Cir. 1998) 143 F.3d 525. In *Siegel,* a lender foreclosed on property and sued for a deficiency judgement. Prior to trial, the debtor declared bankruptcy. The lender filed claims relating to the property in the bankruptcy proceeding, to which the debtor did not object. Before the debtor was discharged from bankruptcy, he filed a tort and contract action concerning the foreclosure. After the discharge, the lender obtained summary judgement on the ground that the debtor's suit was precluded by the res judicata effect of the bankruptcy proceeding. *Siegel* affirmed the summary judgement, as the claims in the debtors actions could have been raised as objections to the claims asserted by the lender in the bankruptcy proceeding. It also affirmed the trial court's award of attorney fees to the lender, rejecting the debtor's argument that the claim for fees was discharged in the bankruptcy. (*Id.* at p.533.) In *Siegel,* however, the debtor "had been freed from the untoward effects of contracts he had entered into. [The lender] could not pursue him further, nor could anyone else. He, however, chose to return to the fray and to use the contract as a weapon. It is perfectly just, and within the purposes of bankruptcy, to allow the same weapon to be used against him....[The debtor's] decision to pursue a whole new course of litigation made him subject to the strictures of the attorney's fee provision. In other words, while his bankruptcy did protect him from the results of his past acts, including attorney's

fees associated with those acts, it did not give him carte blanche to go out and commence new litigation about the contract without consequences." (*Id*, at pp. 533-534.)

The present case is similar to *Siegel* in that appellant filed his Alameda County complaint after filing for bankruptcy; it is different in that the arbitration into which the newly raised claim was merged was begun before the bankruptcy filing. The record is inadequate to determine what claim, if any, respondent file in the bankruptcy case. Appellant insists no claim for attorney fees was filed, and his position is supported by the declaration of his attorney stating that to the best of his knowledge no such claim was filed, as well as, implicitly, by the fact that the reorganization plan does not refer to any claim by respondent with respect to the arbitration and by respondent's post-confirmation letter to appellant stating that it *would* file a "motion for an award of an administrative expense priority claim" if it prevailed on its request for fees from the arbitrators.

Respondent states in its brief on appeal that it "filed a timely proof of claim with respect to its attorney fees at issue albeit, at a time when those attorney fees were unsecured and unliquidated," but cites no support for this assertion.[8] Moreover, the record on appeal provides us with no information as to the content of respondent's objections to the bankruptcy plan, the bankruptcy court's reasons for overruling them or that court's reasons for abstaining from hearing respondent's petition to confirm the arbitration award.

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[8] The reorganization plan does not refer to respondent as a creditor on the "Allowed Secured Claim of World Savings and Loan Association, which claim is secured by a first deed of trust on Debtors Residence." We are aware of nothing in the record that explains the subject of this claim, but respondent's post-confirmation letter announcing a future intention to file a claim for the attorney fees awarded by the arbitrators suggests it had not already made a claim for such attorney fees.

We need not— and, given the state of the record, cannot— determine whether respondent's claim for attorney fees arose pre-or post-petition for purposes of determining whether it was discharged in appellant's bankruptcy. What *is* clear from the record on appeal is that the bankruptcy court, when it approved the reorganization plan, intended the pending arbitration proceedings to continue: The bankruptcy court approved special counsel for appellant to continue the arbitration, the confirmed bankruptcy plan provided for use of the arbitration proceeds to pay creditors, and the plan required approval by the bankruptcy court of any unsettlement of the arbitration. It necessarily follows from the fact that the reorganization plan contemplated continuation of the arbitration that the bankruptcy proceedings did not impair the arbitrators' power to hear the matter. We have been pointed to nothing in the record indication the bankruptcy court imposed any limitation on the arbitrators' power over the dispute. The parties' contract, which, as indicated above, provided for arbitration of the dispute, also provided for reasonable attorney's fee and costs to the prevailing party in "any action, proceeding or arbitration arising out of this agreement." It would make no sense to allow the continuation of an arbitration authorized by the parties' agreement but preclude the arbitrators from effectuating
the attorney fees provision of that same contract.

In the absence of any impediment to the continued prosecution of the arbitration, the arbitrators were empowered to resolve the parties' dispute as specified in their contract. As discussed above, we do not review an arbitration award for errors of fact or law. (*Moncharsh, supra,* 3 Cal. 4th at p. 6, 25-28;*California Faculty Assn. v. Superior Court, supra,* 63 Cal. App. 4th at p. 943-944.

We offer no opinion on the question whether respondent will ultimately be able to collect on the fee award, or whether that award will be determined to have been discharged as a pre-petition debt in some future action to collect upon judgement. The bankruptcy proceeding, however, did not affect the

arbitrators' power to make the award and the trail court did not err in confirming the award.

Finally, appellant urges the trial court erred in confirming the award because the arbitrators had no authority to award respondent $18,096 for the fees paid to its expert witnesses. On this point, we agree. A party entitled to be paid for the costs of arbitration is not entitled to recover the fees of his or her expert witnesses. (*Austin v. Allstate. Insurance. Co, supra,* 16 Cal.App.4th at pp 1815, fn. 2.) Such witness fees are recoverable in the trial court only if the expert witness was ordered by the court. (§ 1033.5, subd. (a) (8), (b)(1).) Absent an agreement to the contrary, each party to an arbitration must bear the costs of his or her own witnesses. (§ 1284.2.) Here, the parties' contract provided for attorney fees and costs to the prevailing party, but did not specifically provide for the expenses of expert witnesses. The contract did specify that arbitration was to be conducted "in accordance with the rules of the American Arbitration Association." The rules of the AAA provide that each party shall pay the expenses of its own witnesses. (AAA Commercial Dispute Resolution Procedures, R-52; Roth, Wulff &Cooper (1999) *The Alternative Dispute Resolution Practice Guide,* § 5.5, p. 5-11.) Respondent has offered no authority to support the arbitrators' inclusion of expert witness fees in the award. Indeed, respondent entirely fails to respond to appellant's argument on this point. We conclude the award of expert witness fees was outside the arbitrators' authority and the trial court erred in confirming that aspect of the award. As the amount awarded for expert witness fees could have been stricken without affecting the merits of the controversy, the trial court should have so corrected the award. (§1286.6, subd. (b).)

DISPOSITION

The judgement is modified to correct the arbitrators' award by striking the $18,096 awarded for expert witness fees and, as so modified, is affirmed.

Kline, P.J.

We concur:

Lambden, J.

Ruvolo, J.

APPENDIX B

First Appellate District, Division Two, No. A084868

S080739

In the Supreme Court of California

[Filed August 16, 2000]

STAN HABR, Appellant,

v.

WORLD SAVINGS AND LOAN ASSOCIATION, Respondent.

Petition for review DENIED.

GEORGE

Chief Justice

APPENDIX C

California Code of Civil Procedure §1286.2. Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was corruption in any of the arbitrators.

(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(f) An arbitrator making the award was subject to disqualification upon grounds specified in Section 1281.9, but failed upon receipt of timely demand to disqualify

himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.